IN THE

Supreme Court of the United States

No. 71-5172

CHARLES O. DUKES,
Petitioner,

v.

WARDEN, CONNECTICUT STATE PRISON,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CONNECTICUT

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Supreme Court of the State of Connecticut is reported, *sub nomine, Charles O. Dukes v. Warden, Connecticut State Prison,* Conn. . A.2d , (33 Connecticut Law Journal No. 2, p. 14, July 13, 1971). (App. p. 48, et. seq.)

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on June 25, 1971, which judgment was announced on July 13, 1971, wherein it affirmed the decision of the Superior Court for Hartford County denying Charles O. Dukes' petition for habeas corpus. The petition for a writ of certiorari was filed on July 27, 1971, and was granted on November 9, 1971. The jurisdiction of this Court is invoked under the authority of 28 U.S.C.A. § 1257 (3).

QUESTIONS PRESENTED

(1) Did the Connecticut Supreme Court err in failing to hold that the petitioner's plea of guilty was involuntary in that it was not made with the effective assistance of counsel?

(2) Did the Connecticut Supreme Court err in failing to find as a matter of law that petitioner's plea of guilty was involuntary because it was made without the effective assistance of counsel due to a conflict of interest?

(3) Did the Connecticut Supreme Court err in affirming the denial of the petition for habeas corpus since an actual conflict of interest, apparent on the face of the record, rendered petitioner's plea of guilty involuntary?

(4) Did the Connecticut Supreme Court err in holding as a matter of law that the trial court made adequate inquiry into the voluntariness of petitioner's pleas of guilty?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner maintains that the judgment of the Connecticut Supreme Court affirming the denial of his petition for a writ of habeas corpus violates his rights under the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On October 6, 1969, petitioner, acting through his Special Public Defender, filed a petition for habeas corpus alleging that his detention in the Connecticut Correctional Institute, Somers, Connecticut, was illegal on the ground that his pleas of guilty were involuntary, were improvidently made and were not the product of his free and intelligent will, in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article First of the Constitution of Connecticut. (App. p. 1-3) A hearing was held on this petition at the Connecticut Correctional Institute on November 5, 1969, before the Superior Court (Levine, J.). On January 15, 1970, judgment entered in favor of the defendant and the petition for habeas corpus was dismissed. (App. p. 34-37) Thereupon, the petitioner, on January 22, 1970, requested certification for review by the Connecticut Supreme Court of questions raised in his petition. Certification having been granted, the petitioner appealed to the Connecticut Supreme Court. On June 25, 1971, the Connecticut Supreme Court affirmed the judgment dismissing the petition for habeas corpus, which decision was announced on July 13, 1971. (App. p. 58)

The petitioner was arrested in Hartford in March, 1967, and charged with a violation of the Uniform State Narcotic Drug Act and larceny—receiving stolen goods. He was represented in the Fourteenth Circuit Court by the law firm of Zaccagnino, Linardos and Delaney, which firm also appeared for him in the Superior Court for Hartford County. Members of this law firm at that time included Peter J. Zaccagnino, Esq.; Robert Delaney, Esq.; and George Linardos, Esq. Both Mr. Zaccagnino and Mr. Delaney handled the matter on different occasions for the petitioner. (App. p. 38).

On May 9, 1967, the petitioner appeared before the Superior Court for Hartford County, Johnson, J., accompanied by Mr. Zaccagnino. (App. p. 8, 39) Prior to that date the petitioner had discussions with regard to his plea during which time Mr. Zaccagnino advised him he should plead

guilty. However, the petitioner maintained that he was innocent and would not agree to plead guilty.

Although the case was set down for trial on May 9, 1967, Mr. Zaccagnino asked the court for permission to withdraw from the case because there was a "slight conflict" between Mr. Zaccagnino and his client. (App. p. 9, 39). The State's Attorney indicated that he had no objection to the withdrawal of counsel provided that other counsel appeared ready to go to trial that day. There followed the filing and argument of several preliminary motions, all of which were argued by Mr. Zaccagnino and disposed of by the court from the bench. (App. p. 10-17).

Mr. Zaccagnino then reiterated his request to withdraw as counsel and asked for a continuance of one day to enable petitioner to obtain new counsel. The court refused to permit Mr. Zaccagnino to withdraw but did grant a one day continuance to enable petitioner to obtain other counsel. The petitioner entered a plea of not guilty and elected a trial by a jury of 12. (App. p. 19-21).

Upon leaving the courtroom the petitioner was arrested by Hartford Police and taken to the Hartford Police Station. As a result of taking some pills, he was admitted to McCook Hospital on May 11, 1967, and discharged on May 13, 1967. (App. p. 40).

On May 16, 1967, the petitioner again appeared before the Superior Court for Hartford County, Johnson, J., accompanied by Mr. Zaccagnino's partner, Mr. Delaney. (App. p. 23). At this time petitioner plead guilty to the original information plus an amendment thereto charging him with larceny. Mr. Delaney was familiar with the case having talked to the petitioner several times about it and having handled it in the Circuit Court. Between May 9, 1967, and May 16, 1967, Mr. Zaccagnino and Mr. Delaney discussed the case many times and both of them agreed they should try to convince the petitioner to plead guilty. During this period Mr. Zaccagnino tried to convince the petitioner to plead guilty. (App. p. 40).

Prior to the entry of the guilty pleas, the court made inquiry as to the voluntariness thereof as follows:

"Mr. LaBelle: Yes, Your Honor, and I would like to ask if inquiry would be made as to change of plea and that he be put to plea on both the original information again and this amendment also. Excuse me, Your Honor. The record also ought to appear that Mr. Delaney is here with him today and he is in the office of Mr. Zaccagnino. I think the Court might inquire with respect to the representation since there had been some indication that counsel had asked to withdraw the other day."

"The Court: Well now, Mr. Dukes, I want to be sure that everything is in order here. I was present the other day, of course, when you were presented and the problem came up about an attorney. Now I want, now Mr. Delaney is here, are you fully satisfied with the services he is rending you, Mr. Dukes?"

"The Accused: Yes, sir."

"The Court: You are. And now you know, of course, Mr. Dukes, that—you know of course that the State of Connecticut has the burden of proving you guilty on the charge and you are free to go to trial but you still wish to change your plea, is that correct?"

"The Accused: Yes, sir."

"The Court: And do you do this of your own free will, Mr. Dukes?"

"The Accused: Yes, sir."

"The Court: And you know the probable consequences of it?"

"The Accused: Yes, sir."

"The Court: Very well, and no one has induced you to do this, influenced you one way or the other? You are doing this of your own free will?"

"The Accused: Yes."

"The Court: Very well then. We will accept the change of plea."

The case was contined to June 2, 1967, for sentencing. (App. p. 24-26, 41-42)

On June 2, 1967, petitioner appeared with Mr. Zaccagnino before the Superior Court for Hartford County, Devlin, J., for sentencing, but the case was continued to June 16, 1967, because the probation report was not finished and because matters to be consolidated from other counties regarding petitioner had not been sent to Hartford. (App. p. 27, 42). On June 16, 1967, petitioner again appeared before the Superior Court of Hartford County, Devlin, J., with Mr. Zaccagnino for sentencing. At that time he advised the court that he wanted to withdraw his guilty pleas and that he had retained other counsel. The State's Attorney advised the court that Attorney Alphonse Fazzano of New Haven had called his office that morning but had not entered an appearance. He objected to a further delay in the proceedings. The request for permission to change pleas was denied, whereupon, after an argument on sentence by Mr. Zaccagnino, the petitioner was sentenced to the State Prison for not less than 5 nor more than 10 years on the First Count and for 2 years on the Second Count. (App. p. 28-33, 42-43, 74).

Ancillary to these proceedings, Mr. Zaccagnino was representing two girls by the name of Sandra Baker and Andrea Sejerman for offenses unrelated to the charges to which the petitioner plead guilty. He was a codefendant in the same case with Sandra Baker and Andrea Sejerman and they were all charged with conspiracy to obtain money by false premises. In that case petitioner was represented by Attorney Boce Barlow. (App. p. 43, 59-62).

On April 18, 1967, the two girls appeared before the Superior Court for Hartford County, Devlin, J., represented by Mr. Zaccagnino and plead guilty to two counts of conspiracy to obtain money by false pretenses each. On June 2, 1967, the two girls appeared again before the Superior Court for Hartford County, Devlin, J., the same judge who was to sentence petitioner two weeks hence, with Mr. Zaccagnino for sentencing. (App. p. 43, 59-62).

During his remarks to Judge Devlin on behalf of the Baker and Sejerman girls, Mr. Zaccagnino told the court that these girls had come "under the influence of Charles Dukes" who had led them astray. He pointed out that because of their cooperation "with the State Police they capitulated Dukes into pleading guilty." He noted also that because of their cooperation Dukes would very "shortly be removed from society." He placed the blame for the offenses committed by the girls on Dukes saying that he was "the most culpable since he had all the instruments with which to dupe the girls." (App. p. 43-44, 68-71).

Whereupon the two girls were sentenced to one year in jail, the execution of which was suspended after six months with probation for three years. (App. p. 72).

SUMMARY OF ARGUMENT

This brief deals with the question of whether or not a plea of guilty entered by a criminal defendant is rendered involuntary, and therefore void, by virtue of the fact that defendant's counsel had a conflict of interest which thereby denied him the effective assistance of counsel guaranteed him by the United States Constitution.

Petitioner contends that at the time he entered his plea of guilty his attorney was representing two girls who had allegedly been involved with the petitioner in other criminal offenses unrelated to the offense for which he is now imprisoned. When the two girls appeared before the trial judge for sentencing, petitioner's counsel heaped blame upon his shoulders for the conduct of the girls. Two weeks later petitioner appeared before the same judge for sentencing with the same attorney.

It is contended that a conflict of interest such as was manifested in this case is sufficient as a matter of law to render the petitioner's plea of guilty involuntary since it goes to the heart of the representation by petitioner's attorney. It is further maintained that an actual conflict of interest was apparent on the record so as to render the plea

of guilty void and that the trial judge failed to make adequate inquiry to determine the voluntariness of the plea.

ARGUMENT

I

A PLEA OF GUILTY IS SUBJECT TO JUDICIAL REVIEW BY WAY OF HABEAS CORPUS TO DETERMINE THE VOLUNTARINESS THEREOF.

Ordinarily a plea of guilty constitutes a waiver by the accused of any defect which is not jurisdictional. It amounts to a confession of guilt in the manner and form as charged in the indictment or information. An accused, by pleading guilty, waives all defenses other than that the indictment charges no offense. He also waives the right to trial and the incidents thereof and the constitutional guarantees with respect to the conduct of criminal prosecutions. *Brisson v. Warden*, 25 Conn.Supp. 202, 200 A.2d 250 (1964). The binding effect of a guilty plea upon all defenses that could have been raised at trial has been accepted in both state and federal decisions.

Since the guilty plea, by its very nature, cuts off further examination by the court of the facts surrounding the crime charged, it has been held that the circumstances attendant upon the entry of the guilty plea are susceptible to a hearing upon a petition for habeas corpus to determine the legality of the petitioner's conviction. In *Doran v. Wilson*, 369 F.2d 505, 507 (9th Cir. 1966) the court held that a petitioner for habeas corpus was entitled to a hearing in spite of his guilty plea, saying:

> When a defendant voluntarily and knowingly pleads guilty at his trial, this constitutes a waiver of all nonjurisdictional defenses . . . . The conviction and sentence which follow a plea of guilty are based solely and entirely upon said plea and not upon any evidence which may have been improperly acquired by the prosecuting authorities. The rule has been repeatedly followed by this court. But there is ano-

> ther side to this legal coin. We have several times held that a guilty plea 'induced' by a coerced confession *or in some other respect not truly voluntary* cannot stand. The basis for these decisions is that a guilty plea must not be a product of violation of fundamental constitutional rights. (Emphasis added.)

Similarly, the Pennsylvania Supreme Court held that the voluntariness of a guilty plea was properly the subject of inquiry in a Petition for Habeas Corpus in *Commonwealth ex rel West v. Myers*, 423 Pa. 1, 222 A.2d 918, 921 (1966) saying:

> The concept of fairness and justice embodied in the due process clause of the Fourteenth Amendment to the Constitution of the United States is incompatible with the practice of permitting convictions based upon guilty pleas not made voluntarily . . . and no plea can be viewed as voluntary that is the product of ignorance.

The United States Court of Appeals for the Second Circuit has affirmed the rule that the facts surrounding a guilty plea should be placed on the record by means of a hearing on a Petition for Habeas Corpus in a case arising in Connecticut. In *Trotter v. United States*, 359 F.2d 419 (2d Cir. 1966), on remand 255 F.Supp. 55 (U.S.D.C. Conn. 1966), the petitioner, having plead guilty to a charge of selling heroin, sought habeas corpus on the grounds that his guilty plea was "coerced" by promises of a suspended sentence made by his court-appointed counsel and an Assistant United States Attorney. The United States District Court denied the petition without a hearing and simply on the record. However, the Court of Appeals reversed and remanded the case, stating that the petitioner was entitled to be heard on the facts surrounding his guilty plea. (Note: On remand conflicting evidence about a "deal" was presented by both sides. Judge Timbers, having heard the evidence, resolved the question in favor of the government on the basis of credibility.)

In another Connecticut case, the United States Court of Appeals for the Second Circuit reiterated the principle that a plea of guilty tainted by coercion, what ever the form, cannot stand. In *United States ex rel Siebold v. Reincke*, 362 F.2d 592, 593 (2d Cir. 1966) the court said:

> A conviction will not be sustained if it rests upon a plea of guilty which is the result of coercion, nor perhaps, if the plea of guilty resulted from other violations of constitutional rights.

Petitioner contends that the word "coercion" is one of art connoting the concept that the plea is a forced one in that it is not entirely the product of one's free and intelligent will. Since "a plea of guilty is, in effect, merely a confession", *State v. Gargano*, 99 Conn. 103, 121 Atl. 657 (1923) should not the same high standards employed by the court in ruling on the admissibility of a confession on the merits be applied with equal vigor in examining the events surrounding what amounts to a judicial confession? The test for the admissibility of confessions is that the confession must be the "voluntary product of a free and unconstrained will under the Fourteenth Amendment," *Haynes v. Washington*, 373 U.S. 503, 514 (1963). The same free and unconstrained will must also be the test for determining whether a guilty plea can stand.

This court has held that a plea of guilty may be collaterally attacked in a post-conviction hearing by a defendant whose allegations of constitutional deprivation raise factual issues and are neither "vague, conclusory, or palpably incredible," *Machibroda v. United States*, 368 U.S. 487, 495 (1962), nor "patently frivolous or false," *Pennsylvania ex rel Herman v. Claudy*, 350 U.S. 116, 119 (1956). As was succinctly stated in *Machibroda, supra:*

> A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to collateral attack. 368 U.S. at 493.

See also *Uveges v. Pennsylvania*, 335 U.S. 437 (1948); *Palmer v. Ashe*, 342 U.S. 134 (1951).

In *McMann v. Richardson*, 397 U.S. 759 (1970) this court held that a defendant's plea of guilty based on reasonbly competent advice is an intelligent plea not open to attack as being involuntary on the ground that his counsel may have misjudged the admissibility of his confession. However, in so holding the court enunciated the guideline that should govern trial judges in maintaining the standards of performance by counsel in their courtrooms, saying in 397 U.S. at 770-771:

> In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases. On the one hand, uncertainty is inherent in predicting court decisions; but on the other hand defendants facing felony charges are entitled to the effective assistance of competent counsel. Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts *with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.* (Emphasis added.)

From the foregoing discussion it is clear that the voluntariness of a plea of guilty is the proper subject matter of a petition for habeas corpus. Obviously, the central question is to determine whether or not the plea was the product of the petitioner's free and voluntary state of mind. Ordinarily state of mind would be a question of fact to be resolved

by the trier of fact. However, petitioner herein has set forth the law at some length in order to show the breadth of review by appellate courts on the issue of voluntariness. As was pointed out in *Johnson v. Wilson*, 371 F.2d 911 (9th Cir. 1967), the effectiveness of counsel may, as a matter of law, be a determining factor in deciding whether or not a plea of guilty is truly voluntary. As will be noted below the petitioner was denied the effective assistance of counsel guaranteed him by the Sixth Amendment to the United States Constitution in that a conflict of interest existed both in law and in fact on the part of his counsel.

II

THE COURT ERRED IN FAILING TO CONCLUDE THAT PETITIONER'S PLEA OF GUILTY WAS INVOLUNTARY.

A. Representation of More Than One Criminal Defendant Whose Interests are Adverse by a Single Attorney Constitutes a Conflict of Interest and a Denial of the Effective Assistance of Counsel.

The Sixth Amendment to the United States Constitution and Article First, Section 8 of the Connecticut Constitution guarantee to every citizen the right to the assistance of counsel in any criminal prosecution. The United States Supreme Court has long held that the term "assistance of counsel" means "effective" assistance of counsel, *Powell v. Alabama*, 287 U.S. 45, 71 (1932); *Avery v. Alabama*, 308 U.S. 444, 446 (1940); *Reece v. Georgia*, 350 U.S. 85, 90 (1955) In *Glasser v. United States*, 315 U.S. 60, 70 (1942) wherein the defendant was himself a former Assistant United States Attorney, the court extended the effective assistance of counsel rule to preclude dual representation where a conflict of interests exists, saying:

> . . . the "assistance of counsel" guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously repre-

> sent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.

The court goes on to say that a heavy responsibility rests on the trial judge to insure that the accused is receiving the effective assistance of counsel. *Id.* at p. 71. In the present case the trial judge who accepted the guilty plea heard petitioner's counsel say he wanted to withdraw because there was a "slight conflict" between him and his client, yet the court did nothing to explore that situation. Then, the trial judge who was to sentence petitioner, having previously heard his counsel heap blame upon him and faced with a request to withdraw his guilty plea and to obtain new counsel, made no effort to insure that petitioner had, and was receiving, the effective assistance of counsel.

Since *Glasser,* the courts both state and federal, have consistently held that where one attorney represents more than one defendant whose interests conflict, whether the attorney be appointed or retained, it is a denial of effective assistance of counsel and is, therefore, error. In *Campbell v. United States,* 352 F.2d 359, 360 (D.C. Cir. 1965), Campbell and a co-defendant, Glenmore, were represented by one retained attorney at their trial on charges of housebreaking and petit larceny. During the trial the attorney virtually ignored the defendant, Glenmore, placing his major emphasis on the defense of Campbell. The court reversed Glenmore's conviction on the sole ground that one attorney representing both defendants rendered his service to Glenmore much less effective. Once again the court placed the duty on the trial judge to make a determination of the adequacy of representation saying:

> Considerations of efficient judicial administration as well as important rights of defendants are served when the trial judge makes the determination that co-defendants have intelligently chosen to be represented by the same attorney and that their decision was not governed by poverty and lack of information on the availability of assigned counsel. We

> must indulge every reasonable presumption against the unimpaired assistance of counsel.

Two years later the Court of Appeals for the District of Columbia Circuit again reviewed the conflict of interest question in *Lollar v. United States*, 376 F.2d 243 (D.C. Cir. 1967). The defendant's conviction was reversed on the ground that he had been denied the effective assistance of counsel since his court-appointed counsel represented both him and a co-defendant. The court held there was no distinction between court-appointed counsel and retained counsel insofar as the rule set forth in *Campbell, supra*, is concerned.

However, the court went on to consider whether the defendant was prejudiced by the joint representation. In deciding this issue, the court took as its guideline the admoniton in *Glasser v. United States, supra*, that "the right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." 315 U.S. at 76. It went on to say that only "where we find no basis in the record for an informed speculation that appellant's rights were prejudicially affected can the conviction stand." In the present case the derogatory remarks of counsel about his client, on the record, are more than a sufficient basis for finding prejudice.

The United States Court of Appeals for the Fourth Circuit went even further than the D. C. Circuit in holding that a conflict of interests amounted to a denial of the effective assistance of counsel. In *Sawyer v. Brough*, 358 F.2d 70, 73 (4th Cir. 1966), a habeas corpus proceeding attacking a conviction for robbery, the court reversed the conviction and remanded the case, saying:

> The salient fact remains that divergent interests did exist, and therefore an opportunity was presented for the impairment of Sawyer's right to the unfettered assistance of counsel. It is not necessary that Sawyer delineate the precise manner in which

> he has been harmed by the conflict of interest; *the possibility of harm is sufficient to render his conviction invalid.* (Emphasis added.)

In *Sawyer* the court is concerned with the mere potential for a conflict of interest. In the present case it is clear from the remarks of Attorney Zaccagnino that a conflict of interest in fact existed. The petitioner was therefore deprived of his right to effective assistance of counsel.

In *People v. Chacon,* 73 Cal. Rptr. 10, 477 P.2d 106 (1968), four co-defendants accused of murder were represented by a court-appointed attorney who had been out of law school some six months. Prior to the time of trial two of the accuseds, Chacon and Noah, advised the court they wanted to represent themselves. Their appointed attorney was to continue to represent the defendant Meyers. However, when the trial was about to commence Chacon and Noah changed their minds and agreed to have Mr. Lopez represent them. They were convicted and subsequently sentenced to death. Under California law the death penalty is imposed by the jury.

The court reversed the convictions of all three defendants on the ground that the trial judge had refused to provide separate counsel for each. In writing the opinion for the court, Traynor, J., said in 447 P.2d at 111:

> The right to counsel at trial guaranteed by the Sixth Amendment of the United States Constitution (*Gideon v. Wainwright* (1963) 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 709) and Article I, Section 13 of the California Constitution does not include an automatic right to separate counsel for each co-defendant. One counsel may represent more than one defendant so long as the representation is effective. (*Powell v. Alabama* (1932) 287 U.S. 45, 71, 53 S.Ct. 55, 77 L.Ed. 158). Effective assistance of counsel is assistance 'untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interest'. (*Glasser v. United States* (1942) 315 U.S. 60, 70, 62 S.

Ct. 457, 465, 86 L.Ed. 680; *People v. Douglas* (1964) 61 Cal.2d 430, 437, 38 Cal. Rptr. 884, 392 P.2d 964). If counsel must represent conflicting interests or is ineffective because of the burdens of representing more than one defendant, the injured defendant has been denied his constitutional right to effective counsel. (*Glasser v. United States, supra; People v. Robinson* (1954) 42 Cal.2d 741, 745-48, 269 P.2d 6; *People v. Lanigan* (1943) 22 Cal.2d 569, 576-577, 140 P.2d 24, 148 A.L.R. 176; *People v. Douglas, supra; People v. Donohue* (1962) 200 Cal.App.2d 17, 24, 19 Cal. Rptr. 454).

The petitioner contends that a clear conflict of interest existed between his case and that of the Sejerman and Baker girls. After reviewing the record, the time sequence of their respective court appearances and the remarks made about him at the sentencing of the girls it is clear that the interests of the petitioner were not the sole and exclusive interests of his attorney. What greater prejudice could there be than for his attorney to heap blame upon the petitioner's shoulders and then appear two weeks later before the very same judge to implore the court's mercy on sentencing. It is apparent that at the time of the entry of his plea, the petitioner could not receive the effective assistance of counsel from Mr. Zaccagnino. How could his plea be based on advice from one who did not have his sole and exclusive interests at heart? The court was in error in making him proceed with an attorney he did not want and later in refusing to permit him to withdraw his guilty plea and to obtain new counsel. The plea should be set aside.

B. A Guilty Plea Resulting From Ineffective Assistance of Counsel in Involuntary and Should Be Set Aside.

As has previously been pointed out, a plea of guilty is merely a confession, *State v. Gargano*, 99 Conn. 103, 121 Atl. 657 (1923), and as such must be the product of a free and unconstrained will under the Fourteenth Amendment, *Haynes v. Washington*, 373 U.S. 503, 514 (1963). If the

plea of guilty is coerced or "in some other respect is not truly voluntary" it cannot stand. *Doran v. Wilson,* 369 F. 2d 505, 507 (9th Cir. 1966); *United States ex rel Siebold v. Reincke,* 362 F.2d 592, 593 (2d Cir. 1966). It is well established that where a guilty plea resulted from ineffective assistance of counsel due to a conflict of interest the plea will not be permitted to stand.

In *Commonwealth v. Cullen,* 216 Pa. Super. 23, 260 A. 2d 818, 820 (1970) the appellant and a co-defendant were represented by one counsel. They pleaded guilty to some charges and not guilty to others but were convicted on all but one count. At sentencing the attorney represented one defendant as less guilty than the other, saying that he had been led by the other. However, they both received the same sentence. The court found this to be a conflict of interest, vacated the sentence and permitted the guilty pleas to be reopened.

In so doing the court in a footnote says that the remarks of counsel at the time of sentencing raise a "serious question with respect to his representation on the plea itself". The court reasons that the attorney might not have given his full measure of devotion with regard to the decision to plead guilty but refuses to speculate on same concerning itself solely "with the potentiality of harm", saying:

> If counsel has a conflict of interest in his representation of two co-defendants we are required to reverse the convictions of the injured parties without a detailed examination of the record. If there is a 'possibility of harm', it is incumbent upon us to assure that the injured party is retried while represented by counsel whose service is not burdened by a conflict.

The similarities between *Cullen* and the instant case are apparent. Attorney Zaccagnino told Judge Devlin that the Baker and Sejerman girls "came under the influence of Charles Dukes" and that he was "the most culpable person because he had all the instruments with which to dupe" them. Two weeks later he was back in front of the same

judge arguing on behalf of the petitioner after the court had denied the petitioner's motion to set aside the guilty plea. A more blatant conflict of interest could not exist. It goes without saying that at that point the trial judge should have interrupted the sentencing of the petitioner to advise him of his counsel's remarks and to insure that he had received effective and adequate representation by his counsel. In light of petitioner's own attempt to set aside his guilty plea at the time of sentencing and to obtain new counsel, the court should have been especially alert to problems between client and counsel.

In *United States ex rel Taylor v. Rundle,* 305 F.Supp. 1036, 1039 (E.D. Pa. 1969) the defendants Taylor and Ingram robbed a store and were caught. Ingram hired an attorney and Taylor some time thereafter "went along" with Ingram's choice. Both plead guilty and at the time of sentencing Taylor testified that he was the more culpable of the two. The attorney did nothing to soften this statement and indeed played upon it in an attempt to mitigate Ingram's sentence. The court granted Taylor's petition for a writ of habeas corpus on the ground that he had been denied the effective assistance of counsel due to a conflict of interest. The plea of guilty was set aside and the State was given sixty days either to appeal the decision or retry Taylor. In granting the writ the court followed the reasoning that petitioner in the present case urges upon this court:

> It is apparent that the attorney's plan in this case was to place the onus of the offense on the offense of the relator, thereby obtaining a lighter sentence for his co-defendant who was his original client. In order to carry out his plan, the attorney had both defendants plead guilty at the proceeding in question. Hence petitioner's plea was substantially affected by the attorney's conflict of interest and the conflict is sufficient to vitiate the entire proceeding on December 15, 1964, including the entering of a plea of guilty by petitioner at that time. A defendant, in deciding whether to plead guilty, is

> entitled to the advice of an attorney untrammeled by conflicting interests.

It is interesting to note the court's concern with the substantial effect of the attorney's conflict of interest on the guilty plea. The entire question of prejudice was analyzed at length by Judge J. Skelly Wright in *Lollar v. United States*, 376 F.2d 243, 246 (D.C. Cir. 1967). After reviewing the authorities, some of which require actual prejudice, others suggesting the mere possibility of prejudice is sufficient, the court takes as its guideline in *Glasser v. United States, supra*, that:

> the right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. 315 U.S. at 76.

The court goes on to point out that if it is claimed that the prejudice resulting from the conflict of interest is harmless it must be shown beyond a reasonable doubt to be harmless, relying on *Chapman v. California*, 386 U.S. 18 (1967).

In the present case the court had two opportunities to allow petitioner to obtain new counsel—when Attorney Zaccagnino himself moved to withdraw due to a "slight conflict" and at the time of sentencing when petitioner moved to set aside his guilty plea and to obtain new counsel. What harm was there in granting either of these requests. The interests of justice would indeed have been better served had the court made inquiry into the situation and allowed the petitioner to proceed with other counsel of his own choosing.

C. Mere Knowledge of Joint Representation by his Attorney Does not Deprive an Accused of the Right To Raise the Issue of an Actual Conflict of Interest on Review.

In his brief in opposition to the petition for certiorari in the present case, respondent argues that petitioner cannot now complain of conflicting interests on the part of his attorney since he had knowledge of Mr. Zaccagnino's other

representation at the time of his retainer, relying on *Ciarelli v. State*, 441 S.W.2d 695, 697 (Mo. 1969); *People v. Stack*, 23 Ill.2d 35, 177 N.E.2d 98 (1961); and *United States ex rel Kachinski v. Cavell*, 311 F.Supp. 827 (M.D. Pa. 1969). However, it has been held that a defendant is unlikely to be sufficiently aware of his right to object to a possible conflict of interest so that "some judicial initiative is probably advisable when the possibility of prejudicial conflict is apparent to the trial court." *Campbell v. United States*, 352 F.2d 359 (D.C. Cir. 1965); *Olshen v. McMann*, 378 F.2d 993 (2nd Cir. 1967); *Wynn v. United States*, 275 F.2d 648 (D.C. Cir. 1960).

It is clear from the record that Judge Devlin, having heard the remarks of Attorney Zaccagnino while sentencing the Baker and Sejerman girls two weeks earlier, had a duty to apprise the petitioner of his rights when he came before him for sentencing. It cannot be presumed that just because the petitioner was aware of the joint representation he was aware that he would be used by his attorney as a foil for the girls.

Indeed where does the responsibility of the trial judge come into play to insure that the accused is being afforded the effective assistance of counsel to which he is entitled? At what point and in what manner should the trial judge "strive to maintain the proper standards of performance by attorneys who are representing defendants in criminal cases before their courts?" *McMann v. Richardson, supra*, 397 U.S. at p. 770.

In *Kent v. State*, 11 Md. App. 293, 273 A.2d 819, 823 (1971) the appellant's co-defendant, one Thomas Mackall, had been tried and convicted of the same crimes charged to the appellant, but at the time of the latter's trial Mackall had not yet been sentenced. Mackall had been represented at his trial by the same attorney representing the appellant. When Mackall was called as a witness for the state in the appellant's trial, the attorney tried to convince Mackall not to testify. However he elected to do so. The appellate

court found that counsel was significantly impaired in his ability to cross-examine Mackall due to the joint representation saying:

> . . . the trial judge should have ascertained for the record whether appellant knowingly and willingly was consenting to the dual representation at a time when he would have been entitled to separate counsel.

Similarly in *Commonwealth v. Booker*, 280 A.2d 561 (Pa. Super. 1971) the court held that an affirmative duty rests upon the trial court to insure that if the accused is waiving his right to have separate counsel that such waiver is knowingly and intelligently made:

> "To waive a right intelligently, one must be aware of the considerations that make it a wise or unwise choice. '[B]efore a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent.' * * * The trial court, however, should not rely upon counsel's explanation alone. 'While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.' * * * *'The judge's responsibility is not necessarily discharged by simply accepting the co-defendants' designation of a single attorney to represent them both.* An individual defendant is rarely sophisticated enough to evaluate the potential conflicts, and when two defendants appear with a single attorney it cannot be determined, absent inquiry by the trial judge, whether the attorney has made such an appraisal or has advised his clients of the risks.' * * *
>
> "In order for an accused to intelligently evaluate his predicament, he should know what a lawyer representing him alone could do. He should know what a lawyer who represents another codefendant

> may be hindered from doing. The court should tell the accused that if he cannot afford to hire another lawyer, then he will be represented by a court-appointed attorney." (Emphasis added.)

See also *McIver v. United States*, 280 A.2d 527 (U.S. App. D.C. 1971) requiring the trial judge to make an affirmative, on the record, determination of an intelligent waiver, relying on *Lollar v. United States*, 376 F.2d 243 (D.C. Cir. 1967).

If the court cannot say that the petitioner was not prejudiced by what was said to the sentencing judge then the conviction must be set aside. *Thompson v. Rundle*, 294 F. Supp. 933 (E.D. Pa. 1968). Where a conflict of interest exists the petitioner does not waive his right to challenge the same by not objecting to it at trial. He will not be presumed to have intentionally relinquished a known right. *Sawyer v. Brough*, 358 F.2d 70, 73 (4th Cir. 1966). If the petitioner has not been advised of the dangers he cannot be said to have waived the right. *Lollar v. United States, supra.*

The record in the present case is devoid of any indication that the petitioner knew his attorney was going to argue before the judge who was to sentence him that he had led two girls down a path of crime. The sentencing judge having heard this allegation had a duty to advise petitioner of his counsel's remarks. Absent this advice he should have let him reopen his guilty plea and proceed on the merits with other counsel as he had requested. Therefore the guilty plea should now be set aside.

III

THE TRIAL COURT FAILED TO MAKE ADEQUATE INQUIRY ON THE RECORD TO DETERMINE THE VOLUNTARINESS OF THE GUILTY PLEA

From the foregoing discussion it is by now clear that a valid plea of guilty is indispensible to the entry of a valid judgment of guilty which is dependent on such a plea. If the guilty plea in any way is deprived of its char-

acter as a voluntary act, the conviction based upon the plea is open to collateral attack. *Machibroda v. United States*, 368 U.S. 487, 493 (1962). The importance to be attached to a plea of guilty was perhaps best summed up in *Brady v. United States*, 397 U.S. 742, 748 (1970), wherein this Court said:

> "That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so—hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."

In *McCarthy v. United States*, 394 U.S. 459 (1969), Rule 11 of the Federal Rules of Criminal Procedure was interpreted to require that the judge determine affirmatively from the defendant's own lips that he knows that the plea need not be made, that he knows the consequences of the plea and that he is acknowledging acts sufficient to establish that he is guilty of the crime charged. The court cannot rely on statements by counsel that the defendant knows these things but must itself supply the defendant with the necessary information and inquire into his comprehension.

In *People v. Seaton*, 19 N.Y.2d 404, 227 N.E.2d 294, 295 (1967), the court overturned a conviction resulting from a guilty plea because the trial judge had failed to make adequate inquiry of the defendant to see that she understood the consequences of her waiver and that she in fact

committed an act which would serve as the basis for her plea. The ends of justice are better served by such an inquiry as the court pointed out:

> "Although such questioning may deprive the guilty plea process of some of its efficiency, it has been well said that these inquiries nonetheless take far less time and are far less demanding of criminal justice resources than full scale trials. The benefits derived for defendants and for the system far outweigh the loss in efficiency. First and foremost, inquiry ensures that the defendant actually committed a crime at least as serious as the one to which he is willing to plead.

Petitioner contends that Judge Johnson's inquiry is inadequate to ensure that he knew the full consequences of his plea and that he actually committed crimes at least as serious as the ones to which he plead guilty. It is not enough that the court ask the accused if he knows the "probable consequences" of his plea and accept a simple "Yessir". The court should ask the accused what the maximum and minimum penalties are and if he does not know, so advise him. The record is devoid of any facts drawn from the petitioner's lips which show that he committed the crimes charged. In view of the previous representation by petitioner's counsel of the "slight conflict" the trial court should have explored this area to satisfy both itself and any reviewing court that a conflict did not in fact exist. This court cannot presume from such a sketchy inquiry that all the blanks are filled in by the magic word "Guilty".

This Court, in effect, incorporated the requirements of Federal Rule 11 into the Fourteenth Amendment by its 1969 holding that the validity of a guilty plea cannot be presumed from a silent record. In *Boykin v. Alabama*, 395 U.S. 238 (1969), the court said that because the tender of a plea of guilty amounts to a waiver of several important procedural rights, the fact of and grounds for waiver must be in the record before the validity of the waiver will be accepted. Petitioner contends that in order to make a satis-

factory record there should be a satisfactory waiver hearing in the first instance.

There are two guidelines which the trial judge may look to in making his inquiry into the voluntariness of the guilty plea. Rule 11 of the Federal Rules of Criminal Procedure provides:

> "A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere.* The court may refuse to accept a plea of guilty, and shall not accept such a plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

The last sentence of Rule 11 requiring a determination that there is a factual basis for the plea is honored more in its breach than application by trial judges. How simple it is to elicit from the defendant enough facts to make a record showing the basis for the plea. The petitioner contends that for this court to uphold the inquiry made by Judge Johnson would be to establish a standard for inquiry upon a plea of guilty that is woefully inadequate and does justice neither to criminal accuseds nor to our criminal procedure.

The other guide for the trial judge may be found in the Minimum Standards established by the American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty (Approved Draft 1968). Section 1.4 requires the court before receiving a plea to address the defendant personally (1) to determine that he understands the nature of the charge; (2) to inform him that by a plea he waives the right to a jury trial; and (3) to inform him of the possible maximum and any mandatory

minimum charge on the offense, and of any additional or different punishment stemming from a prior conviction of crime. The court is then not to accept a plea of guilty or *nolo contendere* without determining it to be voluntary (§ 1.5), which is, of course, the constitutional mandate. The court is to ascertain whether the tendered plea is the result of what the Standards call "plea discussions" and a "plea agreement". If the prosecutor has agreed to seek concessions in sentence or charge, the court is bound to inform the defendant that it is not bound by the prosecutor's recommendations. The court must then find out from the defendant himself whether any promises, force or threats were used to induce the plea. Finally the court must also ascertain that there is a "factual basis" for the plea (§ 1.6).

This last requirement of the determination of a factual basis was inherent in *North Carolina v. Alford*, 400 U.S. 25 (1970) wherein it was held that a plea of guilty did not lose its voluntary character when entered to avoid a harsher penalty if the trial judge satisfied himself and the record that there was sufficient evidence to sustain a finding of guilty if the matter were tried to a conclusion. The Court maintained its position in weighing the character of the plea that:

> "the standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant."

Of course in weighing and choosing from among those alternative courses of action, an accused must be assured of the undivided devotion of his counsel who should spell out for him the choices available and the consequences thereof.

A review of Judge Johnson's inquiry prior to the entry of petitioner's guilty pleas reveals how it fails to measure up to the above standards. It is not enought for the court to ask a series of leading questions to which answers are parroted back. Why did the court not tell the petitioner

of the possible penalties? Why not advise him of the elements of the offense that the state must prove? Why not elicit enough facts to support the plea? What harm was there in asking these few simple questions? How much more time would it take?

Petitioner contends that the record is inadequate to support a presumption that his pleas were voluntary. Coupled with the other factors discussed above, this skimpy record supports his claim that the pleas of guilty should be set aside. If the court shirks its responsibility to make a thorough and searching inquiry into the voluntariness of the plea of guilty, then an integral part of the due process guaranteed every accused has been denied.

IV

THE COURT ERRED IN FAILING TO FIND AS A MATTER OF LAW THAT PETITIONER'S PLEA OF GUILTY WAS INVOLUNTARY

The thrust of this claim of error is that the court erred as a matter of law in failing to hold the petitioner's pleas of guilty to be involuntary as a matter of law. It is clear from the foregoing discussion that representation of more than one defendant whose interests are adverse by a single attorney constitutes a conflict of interest and a denial of the effective assistance of counsel. *Glasser v. United States, supra; Campbell v. United States, supra; Sawyer v. Brough, supra; People v. Chacon, supra.* A guilty plea resulting from such ineffective assistance of counsel is involuntary as a matter of law and should be set aside. *Commonwealth v. Cullen, supra; United States ex rel Taylor v. Rundle, supra; Lollar v. United States, supra.* One cannot presume from a silent record that a plea of guilty was voluntary. *Boykin v. Alabama, supra.* The inquiry made by Judge Johnson was not adequate to give flesh to the requirements of voluntariness, *McCarthy v. United States, supra; People v. Seaton, supra;* nor did it establish sufficient

facts to prove that the plea of guilty was at least a voluntary choice of the alternatives available, *North Carolina v. Alford, supra.* Therefore the court erred in denying petitioner's claim that as a matter of law judgment should enter setting aside his plea of guilty and granting his petition for writ of habeas corpus.

V

THE COURT ERRED IN DENYING THE PETITION FOR HABEAS CORPUS SINCE AN ACTUAL CONFLICT OF INTEREST, APPARENT ON THE FACE OF THE RECORD, RENDERED PETITIONER'S GUILTY PLEA INVOLUNTARY

In its statement of the facts the Connecticut Supreme Court notes that during his remarks on behalf of the Baker and Sejerman girls, Mr. Zaccagnino told the court that these girls had come under the influence of Charles Dukes who had let them astray. It was found that he pointed out that because of their cooperation with the State Police they capitulated the petitioner into pleading guilty. Further he placed the blame for the offenses committed by the girls on Dukes saying that he was the most culpable since he had all the instruments with which to dupe the girls.

In the final analysis this recitation of the facts is the most important aspect of the entire case and points to the fundamental error of the court in denying the petition for habeas corpus. It clearly spells out conduct on the part of Attorney Zaccagnino which is in conflict with the interests of the petitioner. This is conduct which the court found to have happened in fact. Yet in spite of this finding the lower court's decision dismissing the petition for habeas corpus is affirmed.

If this case turned on nice legal questions involving potential conflicts of interest or the possible prejudice of joint representation, then, the court might have found some basis for denying the petition. But we are dealing with a situation wherein an attorney appeared on behalf of an accused

before the very judge, who some two weeks later was to sentence his client, and excoriated him for the involvement of two other accused. This tactic on behalf of the Baker and Sejerman girls might be justified if they were the only two being represented by Attorney Zaccagnino. But when the party who is the victim of these accusations is his own client it is inexcusable. While the petitioner might have known (assuming he were sophisticated enough to recognize it) of a potential conflict of interest, he certainly could not have known that his attorney would turn on him in the fashion he did. Faced with an actual conflict of interest, the trial judge on June 16, 1967, when the petitioner appeared for sentencing, had a duty to advise him of the remarks made to him some two weeks earlier. This duty was especially apparent in view of the petitioner's own request to set aside the guilty plea. The court on review should have set aside the pleas as well.

CONCLUSION

The essence of our adversary system of jurisprudence envisions a testing of issues wherein the combatants are both represented by competent counsel who fight vigorously and to the fullest for their clients' interests. If one of the parties to the action is represented by an attorney who does not have his sole and exclusive interests at heart then the system fails. The strength of our system is what is ultimately in question here. Petitioner contends that a conflict of interest on the part of his attorney has been shown. For him a vital part of the adversary system was not present. Therefore the guilty plea entered by him cannot be claimed to be the product of his free and unconstrained will. It must be set aside.

For all of the foregoing reasons, the judgment of the court below should be--and petitioner requests that it be--reversed, the plea of guilty should be set aside and the matter remanded to the trial court.

Respectfully submitted,

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December 24, 1971